Supreme Court, U.S.
FILED
NOV 24 1992
OFFICE OF THE CLERK

92-894

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LARRY TINSLEY,
Petitioner,

v.

ROBERT KUHLMANN,
Warden, Sullivan Correctional Facility,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM R. STEIN
Counsel of Record
ROBERT B. FUNKHOUSER
WILLIAM S. SHACKELFORD
HUGHES HUBBARD & REED
1300 I Street, N.W.
Washington, D.C. 20005
(202) 408-3600

NICOLAS SWERDLOFF
HUGHES HUBBARD & REED
One Battery Park Plaza
New York, New York 10004
Attorneys for Petitioner
(212) 837-6000

Attorneys for Petitioner

QUESTIONS PRESENTED

1. In reversing on "harmless error" grounds the District Court's grant of writ of habeas corpus based on a confrontation clause violation, did the Court of Appeals contravene this Court's mandate in Delaware v. Van Arsdall that a harmless error analysis focus on the possible impact of the constitutional violation on the jury, rather than on the Court of Appeal's own assessment of the importance of the improperly excluded testimony?

2. Did the Court of Appeals commit reversible error in determining that the constitutional error was harmless without first reviewing the merits of the constitutional violation?

Table of Contents

Questions Presented i

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 2

Constitutional Provision Involved 2

Statement of the Case 2
- Introduction 2
- The State Court Proceeding 2
- The Habeas Proceeding 5

Reasons for Granting the Writ 9

I. The Second Circuit Contravened the Principles set forth in this Court's Decision in Delaware v. Van Arsdall 9

II. The Second Circuit also Contravened Van Arsdall by Determining that the Constitutional Error was Harmless without First Reviewing the Nature of the Error 12

Conclusion 14

APPENDICES

Appendix A:
- Tinsley v. Kuhlmann, 973 F.2d 163 (2d Cir.), cert. filed, November 24, 1992 ..... 1a

Appendix B:
- Judgment of the Second Circuit Court of Appeals 10a

Appendix C:
Opinion and Order of the Southern District of New York..... 12a

Appendix D:
Judgment of the Southern District of New York..... 24a

Appendix E:
Discovery Order of the Southern District of New York..... 26a

Appendix F:
Discovery Order of the Southern District of New York..... 33a

Table of Authorities

Cases ..... Page

Brady v. Maryland, 373 U.S. 83 (1963) 5

Darden v. Wainwright,
477 U.S. 168, 106 S.Ct. 2464 (1986) 10

Delaware v. Van Arsdall,
475 U.S. 673, 106 S.Ct. 1431 (1986) ..... passim

Harper v. Kelly,
916 F.2d 54 (2d Cir. 1990), cert. denied,
111 S.Ct. 1403 (1991) 10

United States v. Hasting,
461 U.S. 499, 103 S.Ct. 1974 (1983) 10

Myrick v. Maschner,
799 F.2d 642 (10th Cir. 1986) 10

People v. Tinsley,
150 A.D. 2d 992, 542 N.Y.S.2d 1002 (1st Dep't),
leave to appeal denied, 74 N.Y.2d 820, 546 N.Y.S.2d
578, 545 N.E.2d 892 (1989) 5

Pope v. Illinois,
481 U.S. 497, 107 S.Ct. 1918 (1987) 10

United States v. Barnes,
798 F.2d 283 (8th Cir. 1986) 10

United States v. Sutton,
794 F.2d 1415 (9th Cir. 1986) 10

Woods v. Kuhlmann,
677 F. Supp. 1302 (S.D.N.Y. 1988) 11-12

Statutes

28 U.S.C. § 1254(1).....2

28 U.S.C. § 2254 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No.

Larry Tinsley,

Petitioner,

v.

Robert Kuhlmann,
Warden, Sullivan Correctional Facility,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Larry Tinsley ("Petitioner") respectfully petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit, dated August 26, 1992, in which the court reversed the Judgment of the United States District Court for the Southern District of New York (Lowe, J.), entered March 3, 1992, which had granted Petitioner a writ of habeas corpus.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 973 F.2d 163 and is reprinted at Appendix A. The Judgment of the Second Circuit is unreported and is reprinted at Appendix B. The Opinion and Order, Judgment, and two discovery opinions of the District Court are unreported and are reprinted at Appendices C through F, respectively.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on August 26, 1992. This Court has jurisdiction to review the Judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution provides in pertinent part that: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him...."

STATEMENT OF THE CASE

Introduction. This case presents important and unresolved questions about the application by appellate courts of the "harmless error" doctrine to confrontation clause violations. This action arises from an order of a state trial court prohibiting all cross examination of a crucial police officer witness concerning his suspension from the police force for assaulting a handcuffed prisoner and his statement to police investigators evading responsibility for the assault. The District Court held that such an absolute prohibition on cross-examination of a police officer witness about evidence of possible bias violated the confrontation clause, and, after considering the factors mandated by Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct.1431 (1986), found as a fact that the violation was not harmless beyond a reasonable doubt. The Second Circuit reversed on the ground of harmless error, without regard to how the constitutional error affected the jury's decision and without first determining whether a constitutional violation had occurred.

The State Court Proceeding. Petitioner Tinsley was charged by the State of New York with two counts each of attempted robbery and criminal possession of a weapon. At trial,

the State's case consisted of two principal witnesses: Mark Jones and Officer David Fleming.[1]

Jones, the complainant, told the following improbable story: Early in the morning of March 30, 1986, while walking down the dimly lit stairway of a building he had never been in after attempting to "visit" a friend whose last name he did not know, Jones was accosted at gunpoint by a black man demanding crack. Jones convinced the man that he had neither money nor crack and was released unharmed. (Tr. Trans. 30-36, 39-40, 65, 74, 99-100.)[2] Jones returned to the building forty minutes later, at approximately 1:25 a.m., with Police Officers Fleming and Daniel Donovan. Petitioner was arrested on the fourth floor stairway landing based on Jones' say-so. (Tr. Trans. 31, 42-44, 151-52.)

Officer Fleming testified that he was on the third floor stairway landing when he first saw Petitioner peek his head around the corner of the fourth floor landing. Officer Fleming ordered him not to move, but Petitioner ducked out of sight. (Tr. Trans. 134-36.) Neither Jones nor Donovan observed this encounter. (Tr. Trans. 195-96.) Jones and Donovan then joined Fleming on the third floor landing and they all advanced up the stairway to the fourth floor. At that point, they confronted Petitioner, and Donovan placed him against the wall. (Tr. Trans. 136-37.) This was the first time Jones saw Petitioner upon Jones' return to the building. (Tr. Trans. 43.)

Officer Fleming further testified that, while Donovan was handcuffing Petitioner by the wall, he discovered a .22 caliber handgun in a trash pile some fifteen feet away from Petitioner. The gun was never submitted for a fingerprint test. (Tr. Trans. 134-35, 137-38, 141-42, 146, 161, 197-98, 209.)

Jones testified that the gun recovered by Office Fleming was the same one used to assault him earlier that morning. Jones

---

1. Petitioner proceeded pro se at trial, with his court-appointed counsel acting as a legal advisor.

2. Citations to "Tr. Trans." refer to the Trial Transcript.

claimed to be able to so identify the gun because it was a "small caliber pistol" that was "worn on top" and "rusted," even though he admitted that he looked at the gun for only two minutes and that he had never personally carried a weapon. Jones also insisted -- in the face of a prior arrest for possession of cocaine which resulted in a guilty plea to disorderly conduct -- that he had no idea what crack is.[3] (Tr. Trans. 36-40, 55, 68-69, 72-75, 92-95.)

Petitioner was the only witness who testified in his defense. He testified that he was driving his cab on Broadway when a woman flagged him down. She wanted to go to the airport, but first asked Petitioner to meet her on the fourth floor of her building and carry her bags to the car. A few minutes after Petitioner arrived on the fourth floor, Officer Fleming arrived on the scene and mistakenly arrested Petitioner. (Tr. Trans. 230-33.)

The case thus boiled down to two conflicting versions of the events, the one presented by Petitioner and the one presented by Jones. The testimony of Officer Fleming, a seemingly impartial police officer, about the circumstances surrounding the recovery of the gun, thereby tipped the scales of this credibility contest in favor of the prosecution.[4]

The jury found Petitioner guilty. (Tr. Trans. 384-387.) The Appellate Division, First Department, affirmed the judgment without written opinion by an order entered May 6, 1989, and

---

3. The other two witnesses called by the prosecution, Officer Donovan and a ballistics expert, testified only to incidental or cumulative matters. App. F at 29a.

4. While Officer Donovan and Jones testified that they saw Officer Fleming recover the gun, they were at the same time busy with Petitioner. (Tr. Trans. 197-98.) In these circumstances, it cannot be said that the jury would have credited the testimony of Donovan and Jones beyond a reasonable doubt absent Fleming's untarnished testimony. Even more clearly, only Fleming claimed to have observed Petitioner peek at him, then duck back -- testimony which was repeatedly relied upon by the prosecution is summation to show that Petitioner had hidden the gun.

leave to appeal to the Court of Appeals was denied August 14, 1989. People v. Tinsley, 150 A.D.2d 992, 542 N.Y.S.2d 1002 (1st Dep't), leave to appeal denied, 74 N.Y.2d 820, 546 N.Y.S.2d 578, 545 N.E.2d 892 (1989).

The Habeas Proceeding. On March 27, 1990, Petitioner filed his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition asserted a violation of Petitioner's confrontation clause right to effectively cross-examine a witness against him and of Petitioner's right under Brady v. Maryland, 373 U.S. 83 (1963), based on the prosecution's failure to produce impeachment material.

Discovery in the habeas proceeding revealed that Officer Fleming previously had assaulted a handcuffed prisoner and, after a police investigation, had been suspended. More importantly, discovery revealed for the first time that Officer Fleming had made a false statement to police investigators concerning what had happened, thereby evading responsibility for the assault. (J.A. 33-40.)[5]

---

5. Citations to "J.A." are to the Joint Appendix filed before the Second Circuit.

The records produced by the police department during discovery in the District Court revealed that, in June 1986, Officer Fleming arrested a DWI suspect and brought him to the precinct house for a test of the suspect's intoxication level. After apparently becoming angered by the suspect's refusal to consent to testing, Fleming rear-cuffed the suspect and pushed him off an 8-inch platform. The suspect sustained multiple injuries, including a broken tooth, a lacerated lower lip, and a bruised right eye. This assault was witnessed by three police officers. About forty minutes later, Fleming reported to the desk officer that his prisoner "fell and injured himself." (J.A. 33.)

The police investigators concluded at the outset of their investigation that Officer Fleming had lied to the desk officer about the assault. Thus, on June 21, after the witnesses had been interviewed, the Police Department suspended Fleming for "assault[ing] a prisoner." (J.A. 41.) Three days later, the Police Department filed formal charges against Fleming for "wrongfully and without just cause push[ing] a handcuffed prisoner." (J.A. 42.)

During the state court proceedings, the prosecution had repeatedly and actively concealed this exculpatory information from both Petitioner and the trial court. For example, the prosecution never supplemented its response to Petitioner's Brady request seeking Officer Fleming's disciplinary records to include the facts concerning Fleming's suspension and false statement. The prosecution also remained silent during pretrial conferences held during July, 1986.

Finally, at a pretrial conference held on August 7, 1986, and only after repeated prodding by the trial court and series of evasive answers, the prosecution reluctantly revealed that the State was not ready for trial that day because Officer Fleming was on suspension.[6] No other facts were disclosed at the conference by the prosecution, including the circumstances of the suspension, their relevance to Fleming's credibility, and the investigation of Fleming for possible criminal charges.

What had been a Brady problem then become a confrontation clause problem: the prosecution continued its cover-up by moving two days before trial, on September 9, 1986, to preclude all cross-examination of Officer Fleming concerning his suspension. At this point, the prosecution finally revealed the basis for Fleming's suspension, vaguely stating that Fleming had been suspended for "allegedly pushing the

---

6. THE COURT: What is the status?
MR. ZIMMERMAN: Your Honor, the People are not ready for trial today.
THE COURT: Why is that?
MR. ZIMMERMAN: The arresting officer is unavailable.
THE COURT: Why is that?
MR. ZIMMERMAN: He is out of town.
THE COURT: What does that mean?
MR. ZIMMERMAN: Your Honor, he is out of town. He is having trouble with the police department and he is currently suspended by the police department. He is going to be reinstated sometime this month.

(J.A. 90-91.)

handcuffed prisoner." (J.A. 98.) The prosecution made no mention of the police department's own finding that Fleming had lied to investigators. To the contrary, the prosecution actively misrepresented the relevance of Fleming's conduct to his credibility.[7] The prosecution also reinforced the trial court's mistaken belief that Fleming would play only a very limited role at trial.[8]

Unaware of the full story, the trial court had no reason to doubt the prosecution's representation that Officer Fleming was an "ancillary" witness whose suspension did not "impact on [his] truthfulness or credibility." Instead, without conducting an in camera inspection of Fleming's disciplinary records, the trial

---

7. MR. ZIMMERMAN: What he's charged with has no impact on truthfulness and credibility.
There are no allegations in this case of brutality on behalf of the arresting officer.
And it would seem to me it's simply not relevant to the instant case.
(J.A. 97-98.) (Emphasis added).

8. THE COURT: Further consideration, my limited exposure thus far is that his testimony is really ansillary to the principal witness, who is the complainant.
MR. ZIMMERMAN: That's correct.
THE COURT: So, this is an accommodation arrest at the behest of the complainant.
MR. ZIMMERMAN: That's correct.
(J.A. 98.) (Emphasis added).

court prohibited all cross-examination of Fleming concerning his suspension.[9]

Based on the evidence uncovered through discovery, the District Court granted the writ. The District Court held, inter alia, that the trial court's total proclusion of cross-examination of Officer Fleming concerning his suspension violated Petitioner's right of confrontation. The District Court further held the violation was not harmless, specifically finding that the suppressed evidence bore directly on the credibility of a key witness against Petitioner and, as such, could have influenced the jury to reach a different result. App. C at 20a-21a.

The Court of Appeals reversed, ruling that any error that might have occurred was harmless, without overturning or otherwise passing upon the District Court's determination that a constitutional violation had occurred.

---

9. The court ruled:

> That [i.e., an in camera inspection] was as of yesterday, something that I had entertained a notion to do, the notion to do.
>
> But now that it's come to my attention, the trivia, totally removed, irrelevant nature of the charges, the trivialization of this whole thing, I am opposed to even that.
>
> * * *
>
> I repeat, this officer's testimony is totally ansillary [sic], however, and further, lacking in the evidentiary underpinning as to other proposed or imagined transgressions on the part of this officer.
>
> I'm precluding any such foray into that area, it's totally irrelevant.

(J.A. 100-02.)

REASONS FOR GRANTING THE WRIT

This petition presents important questions of constitutional law regarding the scope of a federal appellate court's review of a district court's fact-based determination whether evidence excluded from a jury in violation of the confrontation clause might have influenced the jury to reach a different result.

I. THE SECOND CIRCUIT CONTRAVENED THE PRINCIPLES SET FORTH IN THIS COURT'S DECISION IN DELAWARE V. VAN ARSDALL

In Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986), this Court held that the establishment of a confrontation clause violation shifts the burden to the State to meet the following standard of proof to avoid reversal of a conviction:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.

Id. at 684, 106 S.Ct. at 1438. The factors to be considered in this analysis include:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination permitted, and, of course, the overall strength of the prosecution's case.

Id.

Subsequent decisions of this Court and the courts of appeals make clear that the focus of the inquiry must be on the possible impact the excluded evidence or improper instruction

might have had on the jury. See Pope v. Illinois, 481 U.S. 497, 503, n.6, 107 S.Ct. 1918, 1922, n.6 (1987) (holding that the harmless error analysis applicable to an impermissible instruction required the reviewing court to determine if "the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had heard never the impermissible instruction its verdict would have been the same.)"; Darden v. Wainwright, 477 U.S. 168, 182, 106 S.Ct. 2464, 2472 (1986) (noting that the evidence had "reduced the likelihood that the jury's decision was influenced by" constitutional error caused by prosecutorial misstatements)(emphasis added); Myrick v. Maschner, 799 F.2d 642, 645 (10th Cir. 1986) ("the harmless error analysis that we now must undertake requires our viewing the entire record to determine whether the instruction which theoretically could have altered the verdict of the jury actually had such effect as a practical reality.")(emphasis in original); United States v. Barnes, 798 F.2d 283, 289-290 (8th Cir. 1986) (finding that the prohibited impeachment of a DEA agent who supervised a key informant against the defendant made it "possible that the jury's verdict would have been different... ."); United States v. Sutton, 794 F.2d 1415, 1429 (9th Cir. 1986) (judging the constitutional error's "impact, if any, upon the minds of the jurors. . . . .")(emphasis added); see also United States v. Hasting, 461 U.S. 499, 510-511, 103 S.Ct. 1974, 1981 (1983) (regarding a Fifth Amendment violation, "[t]he question a reviewing court must ask is this: absent [constitutional error], is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?") (emphasis added).

The Second Circuit itself has previously recognized that the impact of the excluded testimony upon the jury is the central question in any "harmless error" analysis. In Harper v. Kelly, 916 F.2d 54 (2d Cir. 1990), cert. denied, 111 S.Ct. 1403 (1991), the court found that even though two robbery victims had identified the petitioner, the restriction on cross-examination of one of the victims concerning his identification testimony could not be deemed harmless because the testimony of that witness "was the key (and perhaps the only) evidence that the jury considered in convicting Harper." Id. at 57 (emphasis added).

Here, however, the Second Circuit did not focus on the impact that the missing cross-examination might have had on the jury in this credibility contest. Rather, the court appeared to consider only its own view of the importance of the missing testimony:

> Applying these factors to the instant case, the state trial court's restriction on the cross-examination of Officer Fleming did not prejudice petitioner. The importance of the officer's testimony to the prosecution's case was minimal. His statement as to the retrieval of the gun did not in itself implicate Tinsley; instead it was clearly ancillary to that of the victim, who described the robbery attempt, identified petitioner as the man who tried to rob him, and identified the gun recovered by the officer as the one brandished by Tinsley during the attempted robbery. This testimony by the victim, a security guard familiar with weapons, provided strong evidence of Tinsley's guilt. The officer's testimony on this point was fully corroborated by the assisting officer, who testified that he witnessed the recovery of the gun by Officer Fleming, so that the latter's testimony on this point was merely cumulative. Moreover, Officer Fleming was extensively cross-examined with respect to all other material aspects of his testimony. Finally, cross-examination on this collateral matter would not have seriously weakened the prosecution's strong proof of Tinsley's guilt.

App. A at 7a-8a. The Court of Appeals merely reviewed the evidence to determine whether or not there was evidence independent of Officer Fleming's that could have supported the verdict. Significantly, it did not consider the potentially devastating effect of a prior instance of untruthfulness on a jury's evaluation of the credibility of a key witness who, as a police officer, is innately credible. See Woods v. Kuhlmann, 677

F. Supp. 1302, 1308 (S.D.N.Y. 1988) (granting a writ of habeas corpus after recognizing "the presumption of credibility that attaches to the testimony of law enforcement officers" whose testimony conflict with that of a defendant). Moreover, the Court of Appeals ignored the factual finding of the District Court that the missing evidence concerning Officer Fleming's suspension might well have influenced the jury to reach a not guilty verdict.

By making its own abstracted assessment of the importance of the excluded evidence, the Second Circuit contravened this court's directive in Van Arsdall that the question of harmless error must be answered with reference to the perspective of the jury, as did the District Court when it granted the writ to Petitioner: whether "the jury was truly capable of determining the credibility of the witness." App. C at 19a (emphasis added.) Certiorari should be granted to clarify the proper focus of a reviewing court's application of the Van Arsdall factors.

II. THE SECOND CIRCUIT ALSO CONTRAVENED VAN ARSDALL BY DETERMINING THAT THE CONSTITUTIONAL ERROR WAS HARMLESS WITHOUT FIRST REVIEWING THE NATURE OF THE ERROR

The Court of Appeals declined to rule on or consider the confrontation clause violation found by the District Court, but simply ruled that if error occurred, it was harmless. By avoiding the issue of whether a confrontation clause violation existed, the Second Circuit contradicted the analysis enunciated in the majority opinion in Van Arsdall.

In Van Arsdall, this Court rejected the procedure suggested by Justice White in his concurring opinion, which proposed that the determination of the constitutional error and the determination of the harmlessness of that error should be conflated into a outcome-determinative procedure in which no error is found if the alleged error is harmless.

> It makes much more sense to hold that no violation of the Confrontation Clause has occurred unless there is some likelihood that the outcome of the trial was affected... If it is ultimately held that the outcome would have been the same whether or not cross-examination had been limited, no Sixth Amendment violation occurred in this case.

475 U.S. at 685, 106 S.Ct. at 1438 (White, J., concurring). Rejecting this suggested approach, this Court thoroughly examined the nature of the constitutional error, held that one had occurred, and then remanded the issue to the lower court for the harmless error determination.

In this case, by contrast, the Court of Appeals used essentially the same procedure proposed by Justice White but rejected by the Court in assuming that an error had occurred, then holding the error harmless. The Court of Appeals thereby improperly collapsed the analysis and failed to analyze the merits of the underlying error.

The Court of Appeal's practice in this instance contradicts the instructions given by this Court in Van Arsdall. This Court should grant the writ in order to make clear to all federal courts of appeals that the merits of alleged constitutional errors should be considered before those errors are held to be harmless. Only in this manner can the full impact of the error be assessed in relation to any determination of its alleged harmlessness.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM R. STEIN
Counsel of Record
ROBERT B. FUNKHOUSER
WILLIAM S. SHACKELFORD
HUGHES HUBBARD & REED
1300 I Street, N.W.
Washington, D.C. 20005
(202) 408-3600

NICOLAS SWERDLOFF
HUGHES HUBBARD & REED
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

Attorneys for Petitioner

Date: November 24, 1992

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1682-August Term 1991

(Argued June 8, 1992 Decided August 26, 1992)

Docket No. 92-2150

LARRY TINSLEY,

Plaintiff-Appellee,

—v.—

ROBERT KUHLMANN, Warden,
Sullivan Correctional Facility,

Defendant-Appellant.

Before:

CARDAMONE, WINTER, and MAHONEY,

Circuit Judges.

Robert Kuhlmann, Warden of the Sullivan Correctional Facility, appeals from the March 3, 1992 order of the United States District Court for the Southern District of New York (Lowe, J.) granting Larry Tinsley's petition for a writ of *habeas corpus*. The district court held that the state court's preclusion of all cross-examination of prosecution witness Officer David Fleming concerning his suspension from the police force for unrelated misconduct violated petitioner's rights under the Confrontation Clause of the Sixth Amendment and that this constitutional defect was not harmless. The district court also

held that this error was compounded by the prosecution's failure to disclose the officer's disciplinary records in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

Reversed.

DAVID J. MUDD, Assistant District Attorney, New York, New York (Robert M. Morgenthau, District Attorney, Marc Frazier Scholl, Assistant District Attorney, New York, County, New York, New York, of counsel), *for Defendant-Appellant.*

NICOLAS SWERDLOFF, New York, New York (Robert B. Funkhouser, Hughes Hubbard & Reed, New York, New York, of counsel), *for Plaintiff-Appellee.*

CARDAMONE, *Circuit Judge*:

Robert Kuhlmann, Warden of the Sullivan Correctional Facility, appeals from a March 3, 1992 order of the United States District Court for the Southern District of New York (Lowe, J.) granting Larry Tinsley's petition for a writ of *habeas corpus*. The district court held that the state court's preclusion of all cross-examination of prosecution witness Officer David Fleming, the arresting officer, regarding his suspension from the police force for misconduct unrelated to the arrest, violated petitioner's rights under the Confrontation Clause of the Sixth Amendment and that this constitutional defect was not harmless. The district court also held that this error was compounded by the prosecution's failure to disclose the officer's disciplinary records in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Because we think any defect in petitioner's trial was harmless error, we reverse.

BACKGROUND

On April 17, 1986 Larry Tinsley was charged in New York State Supreme Court, New York County, with two counts of attempted robbery and two counts of criminal possession of a weapon. Prior to trial he moved for disclosure of all potentially favorable information, including whether any of the law enforcement agents expected to be called by the prosecution had disciplinary records, pursuant to *Brady*, 373 U.S. at 86-88. The People stated in response that no *Brady* material was known to exist at that time and that any police disciplinary records were "not discoverable."

At a pretrial conference on August 7, 1986 Assistant District Attorney Jeffrey Zimmerman requested an adjournment of the trial date and informed the court, in the presence of Tinsley and his attorney, that the adjournment was needed because the arresting officer, David Fleming, "is out of town. He is having trouble with the police department and he is currently suspended by the police department. He is going to be reinstated sometime this month."

In a subsequent conference on September 9, 1986 the prosecutor asked the trial court to preclude Tinsley from cross-examining Officer Fleming concerning his suspension. Revealing that the officer had been suspended for pushing a handcuffed prisoner, the prosecution argued that "what he's charged with has no impact on truthfulness and credibility." The Assistant District Attorney contended, in addition, that the officer was merely a cumulative witness, as the most material aspect of his testimony was the discovery of a gun allegedly used in the robbery attempt, which discovery was also witnessed by the victim and the assisting officer. Holding that the officer's suspension was "totally irrelevant" since his testimony was "totally ancillary" and corroborated by other witnesses, the trial court denied petitioner's request that it review the officer's disciplinary records and granted the prosecutor's motion to preclude all cross-examination of Officer Fleming concerning his suspension.

At petitioner's jury trial, the principal witness against him was the complainant, Mark Jones. Jones testified that on the morning of March 30, 1986 he went to an apartment building in Manhattan to visit a friend. As he entered the building, he passed Tinsley, who was standing with his back against the wall on the staircase. Unable to locate his friend, Jones went downstairs, where between the second and third floors he again encountered petitioner. The victim testified that he was stopped by Tinsley, who pointed a worn, rusty, small gun at his stomach and said "Give me the crack you have." When Jones denied that he had any drugs, petitioner repeated his demand, at one point holding the gun about six inches from the victim's stomach and cocking the gun's hammer. After Jones convinced his assailant by turning his pockets inside out that he did not have any crack, he was allowed to leave the building. He testified that this attempted robbery lasted between ten and 15 minutes, and that during that time he was able to study Tinsley's clothing, face, and gun.

After he exited the building, Jones ran three blocks to the nearest police precinct. He approached two uniformed police officers, David Fleming and Daniel Donovan, who were outside, and he related to them the robbery attempt. He described his assailant as a black male, approximately 5'10", wearing a black shirt and black pants. He also described the weapon used as a small caliber revolver. The officers returned with the victim to the building and conducted a floor-by-floor search. Tinsley was apprehended on the fourth floor, and Jones identified him as the man who attempted to rob him. While Officer Donovan held Tinsley against the wall, Jones observed Officer Fleming search through a nearby pile of trash 15 feet away from where Tinsley was found. He saw Officer Fleming recover a gun, which he identified as the one brandished by his assailant during the commission of the crime.

Officer Fleming testified that he and Officer Donovan were approached by Jones outside of their precinct building, told of the robbery attempt, and given a description of the assailant and the gun. He stated they went to the apartment building with the victim and as they were ascending the staircase he looked up

and saw Tinsley on the fourth floor. The officer ordered Tinsley to "freeze," but the suspect disappeared from view. At that time, the three men started towards the fourth floor, where the officer again saw Tinsley. At this point, Tinsley advanced towards the three men, displaying his empty hands. Officer Fleming testified that after Officer Donovan secured the suspect against the wall, he recovered a small caliber handgun in a trash pile 15 feet from where Tinsley was apprehended. Officer Donovan corroborated this testimony, stating that he observed Officer Fleming recover a revolver from the pile of trash between two bags of garbage.

Tinsley, proceeding *pro se* with the assistance of his court-appointed legal advisor, testified in his own behalf. He stated that on the morning of March 30, 1986 he was driving his cab looking for a fare when a woman flagged him down and requested that he pick up her luggage, which was located on the fourth floor of the apartment building where Jones was accosted, and take her to LaGuardia Airport. He testified that he was attempting to retrieve the woman's luggage at the time he was found on the fourth floor of the building.

On September 16, 1986, the jury found Tinsley guilty of all counts. On October 15, 1986, the state court found Tinsley to be a persistent violent felony offender and sentenced him to concurrent indeterminate terms of imprisonment of 25 years to life on each of the counts. On direct appeal, Tinsley claimed, *inter alia*, that the trial court violated his constitutional rights under the Confrontation Clause of the Sixth Amendment by prohibiting cross-examination of Officer Fleming concerning his suspension. In addition, Tinsley claimed that the prosecution violated *Brady*, 373 U.S. 83, by not providing him with Officer Fleming's disciplinary records. His conviction was unanimously affirmed without opinion, *People v. Tinsley*, 150 A.D.2d 992 (1st Dept. 1989), and leave to appeal was denied, *People v. Tinsley*, 74 N.Y.2d 820 (1989).

On March 29, 1990 Tinsley filed a petition for a writ of *habeas corpus* in the Southern District of New York seeking to set aside his conviction on the basis of the same constitutional contentions raised on his direct appeal in state court. The district

court authorized Tinsley to obtain internal police department records relating to Officer Fleming's suspension for purposes of his *habeas* appeal. These records disclosed that on June 21, 1986 Officer Fleming, apparently angered by a suspect's refusal to submit to alcohol testing, pushed the handcuffed prisoner off an eight inches high platform in the presence of three other officers. Officer Fleming reported to his superior that the prisoner "fell and injured himself." After an internal investigation, Officer Fleming was suspended for his role in this incident. After an independent investigation, the district attorney's office decided not to institute criminal proceedings against the officer.

DISCUSSION

I. *The Confrontation Clause Claim*

The district court determined that the state court's preclusion of all cross-examination of Officer Fleming concerning his suspension from the police force for unrelated miscouduct--including his statement evading responsibility for the incident--violated Tinsley's rights to confrontation under the Sixth Amendment and that this constitutional error was not harmless. We need not decide whether the district court was correct in finding Tinsley's Sixth Amendment rights violated by the restricted nature of the cross-examination of this witness because any such violation was harmless error. *See United States v. Simmons*, 923 F.2d 934, 944 (2d Cir.), *cert. denied*, 111 S. Ct. 2018 (1991).

A Confrontation Clause violation must be deemed harmless if, "assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U..S. 673, 684 (1986). *See also Jones v. Berry*, 880 F.2d 670, 673-74 (2d Cir. 1989); *United States v. Towne*, 870 F.2d 880, 886-87 (2d Cir.), *cert. denied*, 490 U.S. 1101 (1989). In conducting this analysis, we must consider (1) how important the witness' testimony was to the prosecution's case, (2) whether the testimony was cumulative, (3) whether other evidence in the record corroborated or contradicted the witness on relevant matters, (4) whether other cross-examination of the witness was permitted and the extent of it, and (5) what effect the testimony would have on proof of defendant's guilt. *See Van Arsdall*, 475 U.S. at 684.

Applying these factors to the present case, the state trial court's restriction on the cross-examination of Officer Fleming did not prejudice petitioner. The importance of the officer's testimony to the prosecution's case was minimal. His statement as to the retrieval of the gun did not in itself implicate Tinsley; instead it was clearly ancillary to that of the victim, who described the robbery attempt, identified petitioner as the man

who tried to rob him, and identified the gun recovered by the officer as the one brandished by Tinsley during the attempted robbery. This testimony by the victim, a security guard familiar with weapons, provided strong evidence of Tinsley's guilt. The officer's testimony on this point also was fully corroborated by the assisting officer, who testified that he witnessed the recovery of the gun by Officer Fleming, so that the latter's testimony on this point was merely cumulative. Moreover, Officer Fleming was extensively cross-examined with respect to all other material aspects of his testimony. Finally, cross-examination on this collateral matter would not have seriously weakened the prosecution's strong proof of Tinsley's guilt. We thus find that any infringement of Tinsley's Sixth Amendment right to confront this witness was harmless beyond a reasonable doubt.

II *The* Brady *Material Claim*

The district court also concluded that the prosecution's failure to provide Tinsley with Officer Fleming's disciplinary records violated his right to obtain impeachment evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Even assuming the district court was correct in finding that the officer's disciplinary records constituted discoverable *Brady* material, failure to disclose such evidence constitutes a due process violation "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (Blackmun, J.) (plurality opinion); *id. at* 685 (White, J. concurring in judgment) (quoting plurality opinion). A reasonable probability in this context means "'a probability sufficient to undermine confidence in the outcome,'" one that might make the difference between a verdict of guilt and innocence. *Id.* at 682 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). Based on the cumulative nature of Officer Fleming's testimony against petitioner and the strong evidence against Tinsley provided by the victim, we cannot suppose that had the prosecution disclosed the officer's disciplinary records there is a reasonable probability they would have changed the result of the trial. *See United States v. Agurs*,

427 U.S. 97, 112-13 (1976). Thus, any *Brady* violation that may have occurred constituted harmless error in this case.

CONCLUSION

Accordingly, the order of the district court granting petitioner a writ of *habeas corpus* is reversed.

APPENDIX B

United States Court of Appeals
for the
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of August, one thousand nine hundred and ninety-two.

Present: HON. RICHARD J. CARDAMONE,
HON. RALPH K. WINTER,
HON. J. DANIEL MAHONEY,

Circuit Judges.

----------x

LARRY TINSLEY,

Plaintiff-Appellee,

-v.-

Docket No. 92-2150

ROBERT KUHLMAN,
Warden, Sullivan Correctional Facility,

Defendant-Appellant.

----------x

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said district

court be and it hereby is reversed in accordance with the opinion of this court..

ELAINE B. GOLDSMITH, Clerk
By:

Edward J. Guardaro,
Staff Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LARRY TINSLEY,

Petitioner, OPINION AND ORDER

-against- 90 Civ. 2139 (MJL)

ROBERT KUHLMANN, Warden,
Sullivan Correctional Facility,

Respondent.

----------x

APPEARANCES:

HUGHES HUBBARD & REED
Attorneys for Petitioner
One Battery Park Plaza
New York, New York 10004

By: NICOLAS SWERDLOFF, ESQ.
ROBERT B. FUNKHOUSER, ESQ.

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Respondent
120 Broadway
New York, New York 10271

By: MONICA R. JACOBSON, ESQ.

MARY JOHNSON LOWE, D.J.

In the above-captioned action, petitioner Larry Tinsley ("Tinsley" or "Petitioner") seeks a writ of habeas corpus

pursuant to 28 U.S.C. § 2254. Currently before this Court is petitioner's motion, pursuant to Rule 8(a) of the Rules Governing Section 2254 Cases and Fed. R. Civ. P. 58, for Judgment on the Written Record and an Order granting the petition and vacating petitioner's conviction. For the reasons set forth below, the motion and the underlying petition for a writ of habeas corpus are granted.

BACKGROUND

This action has been the subject of two Opinions issued by this Court, familiarity with which will be presumed.[1] As we summarized in our previous Opinions, the pertinent factual background is as follows.

Tinsley was convicted, after a jury trial in the Supreme Court, New York County, of two counts of attempted robbery in the first degree and one count each of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree. He was sentenced as a persistent violent felony offender to concurrent prison terms of from twenty-five years to life on all counts. The Appellate Division affirmed the judgment without written opinion by an order entered May 6, 1989. Leave to appeal to the New York Court of Appeals was denied by order of August 14, 1989.

Tinsley proceeded pro se at his trial, with his court-appointed counsel acting as a legal advisor. The prosecution's case consisted of two principal witnesses: Mark Jones and Police Officer David Fleming. Jones testified that the petitioner accosted him in an apartment building and, while pointing a gun at him, demanded either crack or money. After the robbery attempt Jones left the building and went to a nearby police station. Forty minutes later he returned to the scene with two

---

1. Opinion and Order, July 27, 1990; Memorandum Opinion and Order, October 9, 1990.

police officers, Officer Fleming and his partner Officer Donovan.

The evidence at trial disclosed that the robbery took place in a partially dim hallway of an apartment building at 12:30 a.m. Tinsley was arrested inside the building. Officer Fleming testified that his partner grabbed Tinsley and Fleming proceeded to search the area for a gun. Fleming recovered a small caliber gun from a pile of trash about fifteen feet from where Officer Donovan was holding Tinsley. Officer Donovan testified that he had the defendant up against the wall while Officer Fleming searched around for a weapon and, eventually, recovered the gun from the garbage, twelve to thirteen feet to the right of where Officer Donovan was holding Tinsley. The gun was not tested for fingerprints. Tinsley testified at trial that he was in the building at the request of a woman who stopped him while he was driving his cab and asked him to meet her in the building to carry her bags to the car.

In his petition, Tinsley claims that the arresting police officer, who provided important testimony for the prosecution at trial, was biased because he had been suspended by the police force and was under investigation by the District Attorney's Office prior to his testimony. The District Attorney's investigation was terminated during the time petitioner's case was pending. The trial court prohibited all cross-examination of the arresting officer concerning his suspension from the police force, for what the prosecution has represented as beating a handcuffed prisoner. Cross-examination was also precluded concerning a criminal investigation of the incident.

The record below demonstrates that the trial court made its decision to preclude all cross-examination concerning the officer's suspension without conducting an in camera review of the officer's disciplinary records. In addition, despite defendant's request, the prosecution did not turn over the police officer's disciplinary records during pretrial proceedings. Tinsley's petition specifically challenges 1) the trial court's ruling which prevented all cross-examination of the police officer

on the matter of his suspension; and 2) the prosecution's alleged failure to disclose impeachment material.

Based on the allegations in his petition, Tinsley sought discovery before this Court, pursuant to Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts.[2] In an Opinion dated July 27, 1990, this Court granted petitioner's request for limited discovery. Specifically, petitioner was authorized to issue a subpoena duces tecum requiring the New York City Police Department ("NYPD") to appear for a deposition and to produce the following documents:

> (1) All documents concerning the basis for, and duration of, the suspension of Officer David Fleming, Shield No. 24369, in 1986, including the disciplinary record of, and any civilian complaints lodged against, Officer Fleming concerning the basis for the suspension; and
>
> (2) All documents concerning any Internal Affairs investigation of Officer Fleming, Shield No. 24369, and the findings thereof.

Opinion and Order, July 27, 1990, at 5-6.

After receiving the Officer's file, counsel for petitioner wrote this Court:

---

2. Rule 6 provides:

> "[A] party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise."

The records produced reveal that Officer Fleming was suspended on June 21, 1986 because he handcuffed a "DWI" arrestee's hands behind his back and then pushed the arrestee off a 6-inch platform, breaking the front teeth and lacerating the face of the arrestee. Upon being questioned by the NYPD internal affairs investigator, Officer Fleming flatly denied committing that act of brutality. However, the arrestee and three police officers who witnessed the incident each refuted that denial and unequivocally stated that Officer Fleming had, in fact, done the misdeed.

The internal affairs investigator concluded that the brutality charges were substantiated, and a formal disciplinary action against Officer Fleming was commenced. By so concluding, the NYPD implicitly determined that Officer Fleming had lied. Indeed, before the disciplinary hearing was scheduled to commence, Officer Fleming voluntarily agreed to accept a finding of fault and the accompanying sanction of two and one-half months suspension without pay, one year disciplinary probation and reassignment.

Petitioner has attempted to confirm the clear import of these records by deposing the internal affairs officers involved in the investigation. Unfortunately, the investigating office has died and his supervisor has retired and is not available. However, the NYPD records indicate that Armand Durastanti, an Assistant District Attorney, was at the police station at the time of the misconduct and interviewed some or all of the witnesses. The records also indicate that shortly before the pretrial hearing at which the motion to preclude cross-examination was made, ADA Durastanti advised the NYPD that

> the DA had determined not to seek criminal prosecution of Officer Fleming.

By letter of September 24, 1990, Assistant District Attorney Litsky responded to petitioner's letter, claiming that the denial of the right to cross-examine Officer Fleming at trial did not impact upon petitioner's conviction since Officer Fleming was an ancillary witness. In addition, the District Attorney's office argued that petitioner's claim was doomed to fail under the harmless error analysis. See discussion infra.

By Opinion and Order dated October 9, 1990, this Court found that the record does not support the claim that Officer Fleming was an ancillary witness. Indeed, Officer Fleming is the primary witness as to the recovery of the gun, with corroboration supplied by Officer Donovan. We further found as follows:

> Under these circumstances, this Court cannot find at this stage in the proceedings that assuming that the damaging potential of cross-examination were fully realized, it might nonetheless say that the error was harmless beyond a reasonable doubt. Delaware v. Van Arsdale, 475 U.S. 673, 684 (1986).
>
> Since the District Attorney's office is now aware that the Police Department records reveal that an Assistant was present at the police station on the day of the Fleming incident and conducted interviews, this Court will not direct that the office produce its files but only state that such fact shifts the burden of coming forward onto the District Attorney's office. If that office chooses not to make any discovery within thirty days of this order, a hearing will be scheduled on the instant petition.

Opinion and Order, October 9, 1990, at 6-7.

Following the issuance of our Opinion of October 9, 1990, and further submissions by the parties, petitioner's counsel

requested leave to file a motion for judgement on the written record. After a conference before this Court on April 11, 1991, leave to file a motion for judgment on the written record was granted.

DISCUSSION

Petitioner presents two arguments in support of his motion for judgment on his petition for a writ of habeas corpus, claiming that the pretrial and trial proceedings in the New York State Supreme Court violated his constitutional right to a fair trial and his constitutional right to confront his accusers.

I

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Supreme Court has clearly established that the Confrontation Clause "means more than being allowed to confront the witness physically," Davis v. Alaska, 415 U.S. at 315. "Indeed, the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." Delaware v. Van Arsdall, 475 U.S. 673, 678 (1985). The Supreme Court has, nevertheless, allowed reasonable limits on cross-examination, holding that,

> [t]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original).

In the case before us, the trial court precluded all cross-examination concerning Officer Fleming's suspension, even of the fact that the suspension had occurred. It has been well-

established in this Circuit that cross-examination of the arresting officer should have been allowed to determine the nature of the charges for which he had been suspended. Total preclusion of this subject prevented petitioner from demonstrating to the jury the possibility of an improper motive in Officer Fleming's testimony. As we discussed in our earlier Opinion, "[t]he facts surrounding the officer's suspension from the police force were . . . fertile ground for cross-examination." Opinion and Order, July 27, 1990, at 4. Such an examination could show, for example, that the officer "might have been motivated to testify in a manner that would ingratiate himself with his superiors." United States v. Miles, 480 F.2d 1215, 1217 (2d Cir. 1973); see also Davis v. Alaska, 415 U.S. 308 (1974). Whether or not such an improper motive existed is not the question before us. It is the jury's prerogative to determine questions of credibility, a task which must be undertaken based on full knowledge of relevant facts and circumstances. Without the knowledge of Officer Fleming's suspension or the circumstances surrounding it, the jury was presented with the apparently neutral, unbiased testimony of a law enforcement officer, a type of witness whose testimony is traditionally given significant weight by a jury. Woods v. Kuhlmann, 677 F. Supp. 1302, 1308 (S.D.N.Y. 1988) (A presumption of credibility attaches to the testimony of law enforcement officers). In view of the additional reports disclosed in the discovery allowed by this Court, we find it very possible that, if full disclosure of these facts had been made on cross-examination of Officer Fleming at trial, the weight given to his testimony would have been significantly, if not entirely, reduced.

Based on the total omission of the significant evidence of Officer Fleming's disciplinary records and suspension, we cannot say that the jury was truly capable of determining the credibility of the witness. Thus, we find that the trial judge abused his discretion in denying petitioner the right to cross-examine Officer Fleming concerning the circumstances regarding his suspension from the police force. United States v. Corr., 543 F.2d 1043, 1051 (2d Cir. 1976).

Based on this finding of an infringement of the Confrontation Clause, we must now proceed to the second level

of inquiry -- whether the constitutional violation was harmless error. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. at 684.

An evaluation of the limits on cross-examination imposed by the trial court below, in light of the additional material brought out by the discovery allowed on the petition before this Court, demonstrates that the total preclusion of cross-examination concerning Officer Fleming's suspension cannot be found to be harmless beyond a reasonable doubt. As we found previously, Officer Fleming was undoubtedly an important witness at the trial, providing key testimony as to the retrieval of the gun. Opinion and Order, October 9, 1990, at 4. In addition, the testimony that would have come out on cross-examination would clearly not be cumulative, given that absolutely no evidence concerning disciplinary matters regarding Officer Fleming had been produced. Similarly, there was no cross-examination "otherwise permitted" on this issue, another element

indicating the existence of reasonable doubt as to whether the constitutional error was harmless.[3] Under the circumstances before us, we cannot say that the state has met his heavy burden of proving harmless error. Harper v. Kelly, 916 F.2d 54, 57 (2d Cir. 1990). Accordingly, Tinsley's petition will be granted on the basis of the trial court's violation of his rights under the Confrontation Clause of the Sixth Amendment.

II

Our finding that petitioner was denied his constitutional right to confront the witnesses against him is enough to grant the petition for a writ of habeas corpus. In addition, however, we note that the circumstances surrounding petitioner's second claim of constitutional error, that his rights pursuant to Brady v. Maryland, 373 U.S. 83, 87 (1963), were violated, compound the deficiencies of the constitutional infringement and, thus, support our finding above in all respects.

---

3. We find nothing in the material submitted by ADA Litsky in response to our October 9, 1990 Opinion to contradict our finding that the constitutional error cannot be said to be harmless beyond a reasonable doubt. In fact, the claim that ADA Litsky "is aware of no statement by Officer Fleming that could be termed a 'lie'" is simply not credible given the Investigating Officer's Report disclosed in the discovery allowed on this petition. See Letter to Court from Nicolas Swerdloff, November 20, 1990, Exhibit 1. It seems clear from that report that, at a minimum, Officer Fleming misrepresented the incident in which he assaulted a prisoner, as witnessed by two other officers, and then told another officer at the desk that his prisoner "had tripped and fell." Id. In addition, the Prosecution Memorandum from the Department Advocate's Office, written by Lieutenant George A. Grasso, specifically states that Officer Fleming "denies knowledge [of] how prisoner received injured (sic) to face and lip." Id., Exhibit. 4. The artful denials in ADA Litsky's analysis of these matters only reinforce the finding that total preclusion of cross-examination at trial on this sensitive issue was clearly an error of constitutional magnitude.

Petitioner claims that he was denied his right to a fair trial by prosecution's failure to disclose impeachment evidence. Giglio v. United States, 405 U.S. 150, 154 (1972). Indeed, petitioner was never given the opportunity to examine the disciplinary records of Officer Fleming, records that were specifically requested by petitioner prior to trial. Based on the material that has been submitted in the discovery process on the petition before us, we find that the material requested would clearly be within the meaning of Brady, which requires disclosure by the prosecution of evidence affecting a witness's credibility.[4] Full disclosure of the facts and circumstances of Officer Fleming's suspension and the official investigation surrounding the suspension would clearly have provided substantial opportunity for impeachment of Officer Fleming on cross-examination.

Thus, while we need not determine that the Brady infringement alone would require granting the writ of habeas corpus before us, in conjunction with the Confrontation Clause violation discussed above, the facts before us clearly demonstrate that petitioner was denied full access to impeachment evidence that was in the hands of the prosecution and should have been disclosed, pursuant to Brady v. Maryland, during pretrial proceedings.

---

4. The information in the disciplinary records was clearly Brady material, regardless of ADA Zimmerman's statement that he "was not apprised" of Officer Fleming's denial of knowledge regarding the injuries to the prisoner in question. See Zimmerman Affidavit, November 30, 1990, at ¶ 7. Information such as this, in circumstances such as this, would clearly be knowledge imputed to the prosecution. Giglio v. United States, 405 U.S. at 154; Wedra v. Thomas, 671 F.2d 713, 717 n.1(2d Cir.), cert. denied, 458 U.S. 1109 (1982) (Knowledge in the hands of the police may be attributable to the prosecution where the police act as an arm of the prosecution).

CONCLUSION

The circumstances discussed in this and our prior Opinions, supported by the evidence produced in discovery before this Court, require us to grant petitioner's motion. The petition for a writ of habeas corpus is granted and the conviction set aside. Tinsley is to be released unless the state, within a reasonable time not to exceed sixty (60) days, affords him a new trial. See Harper v. Kelly, 916 F.2d 54 (2d Cir. 1990).

It Is So Ordered.

Dated: New York, New York
February 19, 1992

_____

_____

United State
District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LARRY TINSLEY,

90 CIVIL 2139 (MJL)

Petitioner,: **JUDGMENT**

-against-:

ROBERT KUHLMAN, Warden,:
Sullivan Correctional Facility,

Respondent.

----------x

Petition for a Writ of Habeas Corpus pursuant to T. 28 U.S.C. 2254, having been submitted to the Honorable MARY JOHNSON LOWE, U.S.D.J., and the Court thereafter on February 28, 1992, having handed down its opinion and order (#69418); granting the petition for a writ of habeas corpus, and setting aside the conviction, and petitioner is to be released unless the State, within a reasonable time not to exceed sixty (60) days, affords him a new trial, it is,

ORDERED, ADJUDGED AND DECREED; That the petition for a writ of habeas corpus be and it is hereby granted, and it is further,

ORDERED, that the conviction be and it is hereby set aside. Larry Tinsley is to be released unless the State, within a reasonable time not to exceed sixty (60) days, affords him a new trial.

DATED: NEW YORK, NEW YORK

March 3, 1992 Clerk

APPENDIX E

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

----------x

LARRY TINSLEY,

Petitioner, MEMORANDUM OPINION AND ORDER

-Against-

ROBERT KUHLMANN, 90 Civ. 2139 (MJL)

Respondent

----------x

APPEARANCES:

HUGHES HUBBARD & REED
Attorneys for Petitioner
One Battery Park Plaza
New York, New York 10004

BY: NICOLAS SWERDLOFF, ESQ.
JOHN S. ALLEE, ESQ.
ROBERT FUNKHOUSER, ESQ.

ROBERT ABRAMS
Attorney General for the State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271

BY: MONICA R. JACOBSON
Assistant Attorney General

MARY JOHNSON LOWE, D.J.

In the above-captioned action, petitioner Larry Tinsley seeks a writ of habeas corpus. In pursuit of this relief, Tinsley

has submitted a motion for leave to conduct discovery of non-parties, the New York City Police Department, the New York County District Attorney's Office, and former Assistant District Attorney Jeffrey Zimmerman on an expedited basis.

BACKGROUND

Tinsley was convicted, after a jury trial in the Supreme Court, New York County, of two counts of attempted robbery in the first degree and one count each of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree. He was sentenced as a persistent violent felony offender to concurrent prison terms of from twenty-five years to life on all counts. The Appellate Division affirmed the judgment without written opinion by an order entered May 6, 1989, and leave to appeal to the New York Court of Appeals was denied August 14, 1989.

At Tinsley's trial, Tinsley proceeded pro se, with his court-appointed counsel acting as a legal advisor. The prosecution's case consisted of two principal witnesses: Mark Jones and Police Officer David Fleming. Jones testified that the petitioner accosted him in an apartment building and while pointing a gun at him demanded either crack or money. Jones then went to the police station and returned forty minutes later with Police Officers David Fleming and Daniel Donovan. Tinsley was arrested sitting inside the building. Officer Fleming testified that he found a gun nearby in a trash pile. Tinsley testified that he was driving his cab when a woman asked him to meet her at the building and carry her bags to the car. The gun was not tested for fingerprints. The other two witnesses called by the prosecution, Officer Donovan and a ballistics expert, testified to minor matters only.

Prior to the trial, defense counsel requested that the trial judge examine Tinsley's Police Department file for impeachment material since the Assistant District Attorney ("ADA") disclosed that Officer Fleming was under suspension and had been investigated by the District Attorney's office concerning the matter.

ADA Zimmerman at page 3 of the minutes of a pre-trial hearing on September 9, 1986 responded:

It has no impact on this case. What he's charged with has no impact on truthfulness and credibility.[5]

The Court ruled:

> . . . this officer's testimony is totally ancillary (sic), however, and further, lacking in the evidentiary underpinning . . . I'm precluding any such foray into that area, its totally irrelevant.[6]
>
> Tinsley requested that this Court issue broad subpoenas to the District Attorney's office and the Police Department for discovery prior to the habeas corpus hearing.
>
> After hearing on this request this Court ruled in an opinion dated July 27, 1990:
>
> We do feel however that petitioner should proceed slowly in his efforts to obtain discovery. At this time, therefore, we authorize petitioner to conduct discovery only as to the New York City Policy Department ("NYPD"). Petitioner may issue a subpoena duces tecum requiring the NYPD to appear for a deposition and to produce the following documents:
>
> (1) All documents concerning the basis for, and duration of, the suspension of

---

5. Ex. 7 in Appendix for Writ.

6. Ibid at p. 7.

Officer David Fleming, Shield No. 24369, in 1986, including the disciplinary record of, and any civilian complaints lodged against, Officer Fleming concerning the basis for the suspension; and

(2) All documents concerning any Internal Affairs investigation of Officer Fleming, Shield No. 24369, and the findings thereof.

These documents are to be produced and the depositions are to be held on an expedited basis, the dates of which should be determined by the parties. After conducting this discovery, if petitioner believes discovery from the district attorney's office or any other party is necessary, he may make such a request by letter at that time.

After receiving the Officer's file, counsel for petitioner wrote this court:

The records produced reveal that Officer Fleming was suspended on June 21, 1986 because he handcuffed a "DWI" arrestee's hands behind his back and then pushed the arrestee off a 6-inch platform, breaking the front teeth and lacerating the face of the arrestee. Upon being questioned by the NYPD internal affairs investigator, Officer Fleming flatly denied committing that act of brutality. However, the arrestee and three police officers who witnessed the incident each refuted that denial and unequivocally stated that Officer Fleming had, in fact, done the misdeed.

The internal affairs investigator concluded that the brutality charges were substantiated, and a formal disciplinary action against Officer Fleming was commenced. By so

concluding, the NYPD implicitly determined that Officer Fleming had lied. Indeed, before the disciplinary hearing was scheduled to commence, Officer Fleming voluntarily agreed to accept a finding of fault and the accompanying sanction of two and one-half months suspension without pay, one year disciplinary probation and reassignment.

Petitioner has attempted to confirm the clear import of these records by deposing the internal affairs officers involved in the investigation. Unfortunately, the investigating officer has died and his supervisor has retired and is not available. However, the NYPD records indicate that Armand Durastanti, an Assistant District Attorney, was at the police station at the time of the misconduct and interviewed some or all of the witnesses. The records also indicate that shortly before the pretrail hearing at which the motion to preclude cross-examination was made, ADA Durastanti advised the NYPD that the DA had determined not to seek criminal prosecution of Officer Fleming.

Although a clear inference may be made from the facts disclosed that Officer Fleming lied during the police department investigation, the District Attorney, by letter dated September 24, 1990 resists further discovery claiming that the denial of the right to cross-examine Officer Fleming at trial did not impact upon petitioner's conviction since Officer Fleming was an ancillary witness. ADA Litsky argues that petitioner's claim is doomed to fail under harmless error analysis.

After examining the submissions, this Court cannot say with the certainty of ADA Litsky that petitioner's claim is doomed.

An examination of the evidence at trial disclosed that the robbery took place in a partially dim hallway of an apartment building at 12:30 a.m. Officer Fleming testified[7] that his partner (Donovan) grabbed Tinsley and Fleming proceeded to search the area for a gun. Fleming recovered a small caliber gun from a pile of trash about fifteen feet from where Officer Donovan was holding Tinsley. Officer Donovan testified that he had the defendant up against the wall while Officer Fleming searched around for a weapon and Officer Fleming recovered the gun twelve to thirteen feet to Donovan's right from the garbage.

This record does not support a claim that Officer Fleming was an ancillary witness, rather, he is the primary witness as to the recovery of the gun, with corroboration supplied by Officer Donovan.

In Delaware v. Van Arsdall, 475 U.S. 673 (1986) the Supreme Court held that the prohibition of all inquiry into the possibility that the prosecution witness may be biased violates the confrontation clause of the Federal Constitution.

In the instant case, the Court prohibited all inquiry into the underlying facts of Officer Fleming's suspension. In addition, the Police Department records show that ADA Durastanti was at the police station when Officer Fleming's misconduct occurred and interviewed persons involved. If ADA Durastanti's files show that Officer Fleming, at that time denied he assaulted his prisoner, the District Attorney's office should have been put on notice that the officer lied. Such evidence would arguably be within the Brady rule; but in any event should have been disclosed to the trial court so that court could have made a fair assessment of the facts before it prohibited all cross-examination into the area.

---

7. Trial transcript 137-138.

Under these circumstances, this Court cannot find at this state in the proceedings that assuming that the damaging potential of the cross-examination were fully realized, it might nonetheless say that the error was harmless beyond a reasonable doubt. Delaware v. Van Arsdale, 475 U.S. at 684.

Since the District Attorney's office is now aware that the Police Department records reveal that an Assistant was present at the police station on the day of the Fleming incident and conducted interviews, this Court will not direct that the office produce its files but only state that such fact shifts the burden of coming forward onto the District Attorney's office. If that office chooses not to make any discovery within thirty days of this order, a hearing will be scheduled on the instant petition.

IT IS SO ORDERED.
Dated: New York, New York
October 9, 1990

_____
United District Court Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LARRY TINSLEY,

Petitioner,

OPINION AND ORDER

OPINION AND ORDER

-against-

90 Civ. 2139 (MJL)

ROBERT KUHLMAN,

Respondent.

----------x

MARY JOHNSON LOWE, D.J.

In the above-captioned action, petitioner Larry Tinsley seeks a writ of habeas corpus. In pursuit of this relief, Tinsley has submitted a motion for leave to conduct discovery of non-parties the New York City Police Department, the New York County District Attorney's Office, and former Assistant District Attorney Jeffrey Zimmerman on an expedited basis. For the reasons discussed below, petitioner's motion is granted in part.

BACKGROUND

Tinsley was convicted, after a jury trial in the Supreme Court, New York County, of two counts of attempted robbery in the first degree and one count each of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree. He was sentenced as a persistent violent felony offender to concurrent prison terms of from twenty-five years to life on all counts. The Appellate Division affirmed the judgment without written opinion by an order

entered May, 6, 1989, and leave to appeal to the New York Court of Appeals was denied August 14, 1989.

At Tinsley's trial, Tinsley proceeded pro se, with his court-appointed counsel acting as a legal advisor. The prosecution's case consisted of two principal witnesses: Mark Jones and Officer David Fleming. Jones testified that the petitioner accosted him in an apartment building and while pointing a gun at him demanded either crack or money. Jones then went to the police station and returned forty minutes later with Officer Fleming. Tinsley was arrested sitting inside the building. Officer Fleming testified that he found a gun nearby in a trash pile. Tinsley testified that he was driving his cab when a woman asked him to meet her at the building and carry her bags to the car. The gun was not tested for fingerprints. The other two witnesses called by the prosecution, Officer Donovan and a ballistics expert, testified to very minor matters only.

In his petition, Tinsley claims that the arresting police officer, who provided important testimony for the prosecution, was partial because he was suspended by the police force and being investigated by the District Attorney's Office prior to his testimony, and the DA's investigation of him was terminated during the time petitioner's case was pending. Specifically, Tinsley challenges a) the trial court's ruling that prevented all cross-examination of the police officer on this matter and b) the prosecution's alleged failure to disclose impeachment material.

The trial court allegedly prohibited all cross-examination of the arresting officer concerning both his suspension from the police force, for what the prosecution has represented as beating a handcuffed prisoner, and a criminal investigation of that incident by the prosecution. The trial court is claimed to have made this decision without conducting an in camera review of the officer's disciplinary records.

It is also alleged that the prosecution did not turn over the police officer's disciplinary records despite a request by the petitioner for the arresting officer's disciplinary records.

DISCUSSION

Based on these allegations, Tinsley seeks discovery pursuant to Rule 6 of the Rules Governing Section 2254 Cases in the United District Courts. The Rule provides as follows:

"[A] party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for a good cause shown grants leave to do so, but not otherwise."

Such discovery may be granted prior to an evidentiary hearing. See Advisory Committee Note, Rule 6 of the Rules Governing § 2254 Cases ("There may be instances in which discovery would be appropriate beforehand . . . . Pre-hearing discovery may show an evidentiary hearing to be unnecessary as when there are 'no disputed issues of law or fact'").

After reviewing Tinsley's petition, it is the opinion of this Court that petitioner should be entitled to engage in limited discovery at this stage in the proceedings. In Delaware v. Van Arsdall, 475 U.S. 673 (1986), the Supreme Court found that where a trial court "prohibited all inquiry into the possibility that [a prosecution witness] would be biased as a result of the State's dismissal of his pending public drunkenness charge . . . . the court's ruling violated [the defendant's] rights secured by the Confrontation Clause." Id. at 679. In Davis v. Alaska, 415 U.S. 308 (1974), the Supreme Court reversed defendant's conviction because the trial court had improperly precluded all cross-examination of a crucial prosecution witness concerning his adjudication as a juvenile delinquent and his probation status. Id. at 315-316.

The facts surrounding the officer's suspension from the police force were also fertile ground for cross-examination. In facts similar to those in the case at bar, the court in United States v. Garrett, 542 F.2d 23 (6th Cir. 1976) reversed defendant's conviction where the trial court permitted a police officer who had been suspended for refusing to take a urine test to be asked

whether and for how long he had been suspended, but not about the facts underlying the suspension. Id. The Second Circuit has also held that a defendant is entitled to cross-examine the arresting officer about the nature of the charges for which he had been suspended to show that "he might have been motivated to testify in a manner that would ingratiate himself with his superiors." United States v. Miles, 489 F.2d 1215, 1217 (2d Cir. 1973).

In the case before us, Tinsley was not permitted to even ask Officer Fleming, whether or not he had been suspended, let alone probe the details of that suspension or the subsequent investigation by the District Attorney.

It is the opinion of this Court that petitioner may already have made out a prima facie case that his constitutional rights under the Confrontation Clause were infringed. Yet, even assuming petitioner will be able to make this showing without further discovery, we would still need to proceed to the second level of analysis -- whether that constitutional violation was harmless error. Id. at 684. In Delaware v. Van Arsdall, the Supreme Court noted that "the correct inquiry is whether assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Id. (emphasis added). For this inquiry, therefore, we would need to know the facts surrounding Fleming's suspension, and the DA's investigation of him in order to determine how damaging cross-examination on this issue could have been at the trial. These issues are therefore proper areas for discovery.

We do feel however that petitioner should proceed slowly in his efforts to obtain discovery. At this time, therefore, we authorize petitioner to conduct discovery only as to the New York City Police Department ("NYPD"). Petitioner may issue a subpoena duces tucem requiring the NYPD to appear for a deposition and to produce the following documents:

(1) All documents concerning the basis for, and duration of, the suspension of Officer David Fleming, Shield No.

24369, in 1986, including the disciplinary record of, and any civilian complaints lodged against, Officer Fleming concerning the basis for the suspension; and

(2) All documents concerning any Internal Affairs investigation of Officer Fleming, Shield No. 24369, and the findings thereof.

These documents are to be produced and the depositions are to be held on an expedited basis, the date of which should be determined by the parties. After conducting this discovery, if petitioner believes discovery from the District Attorney's office or any other party is necessary, he may make such a request by letter at that time.
It is so Ordered.

Date: New York, New York
July , 1990

_____
United States District Judge

APPEARANCES:

HUGHES HUBBARD & REED ROBERT M. MORGENTHAU
Attorney for Petitioner
District Attorney, New York County
One Battery Park Plaza
Attorney for Defendant
New York, New York 10004
One Hogan Place
New York, New York 10013

BY: NICOLAS SWERDLOFF
ROBERT FUNKHOUSER
BY: THOMAS B. LITSKY